U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue date: 05Nov2002

Case No. 2001-LHC-2252
OWCP No. 2-124684

In the Matter of

DANIEL L. OBERTS,

Claimant,

v.

Al SALAM AIRCRAFT COMPANY,

Employer,

and

INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA c/o
AIG WORLD SOURCE,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES[1]:

Robert T. Newman, Esq.
Garofall, Schreiber, & Hart
Chicago, Illinois
For the Claimant

Richard L. Garelick, Esq.
Flicker, Garelick, & Associates

---

[1] The Director, Office of Workers' Compensation Programs, did not appear at nor was represented by counsel at the hearing.

New York, New York
For the Employer

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq. (herein after referred to as either LHWCA or the Act).

On May 25, 2001, this case was referred to the Office of Administrative Law Judges by the Office of Workers' Compensation Programs for a hearing. Following proper notice to all parties, a formal hearing in this matter was held before the undersigned on January 16, 2002, in St. Louis, Missouri. All parties were afforded full opportunity to present evidence as provided in the Act and the Regulations issued thereunder and to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX. 2, EX. 1 through 14 and CX. 1 through 56 pertain to the exhibits admitted into the record and offered by the Administrative Law Judge, the Employer, and the Claimant, respectively. The transcript of the hearing is cited as Tr. followed by page number.

Stipulations

At the hearing, the parties submitted the following stipulations: (ALJX. 2)

1. The parties are subject to the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §901 et seq.) as extended by the Defense Base Act.

2. The Claimant and the Employer were in an employee-employer relationship at the time of the injury;

3. The accident/injury arose out of and in the scope of employment;

4. The accident/injury occurred on May 18, 1999, in Saudi Arabia;

5. The Employer was advised or learned of the accident/injury on May 31, 1999;

6. The Employer was timely notified of the injury;

7. The Employer filed a first report of injury (form LS-202) with the United States Department of Labor on June 14, 1999;

8. The Claimant filed a claim for compensation (form LS-203) with the United States Department of Labor on both April 24, 2000, and on December 6, 2000;

9. The Claimant filed a timely claim for compensation;

10. The Employer or Carrier filed a notice of controversion on April 5, 2001;

11. The Employer paid the Claimant full salary through and including February 6, 2001;

12. The Claimant sustained a prior injury involving his neck on October 28, 1997, while he was in the employ of another employer (i.e. Boeing), and Claimant has been receiving compensation benefits from that employer relative to that prior injury (for an agreed upon period of six months beginning July 3, 2001).

Issues

The Issues in this case are:

1. Whether any claimed entitlement to both medical benefits and temporary total disability benefits during the 20 5/7 week period from February 7, 2001, through July 2, 2001, is due to a disability involving the Claimant's right shoulder that is causally related to the May 18, 1999, injury;

2. The nature, extent, and duration of the Claimant's disability, if any;

3. The Claimant's average weekly wage at the time of the injury;

4. Whether the Claimant is entitled to causally related medical benefits;

5. Whether the Claimant is entitled to Section 14 additional compensation, interest;

6. Alternatively, as a protective measure, whether the Employer is entitled to relief under Section 8(f) of the Act; and,

7. Attorney fees under Section 28.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Background:

The Claimant, Daniel Oberts, was born on May 6, 1961, and was forty years of age at the time of the hearing. (CX. 5) The Claimant moved to Saudi Arabia in 1997 for employment at McDonnell Douglas Service, Inc. Shortly upon arrival, the Claimant was transferred to Boeing Co. Two incidents while working at Boeing should be noted. First, in July 1997, during a softball game, the Claimant injured his right shoulder. (Tr. 71) Second, on October 28, 1997, the Claimant seriously injured his neck when involved in a bus accident. (Tr. 86-88) This injury required extensive therapy. (Tr. 75)

The Claimant subsequently became an employee of the Employer, maintaining similar work duties as an "aircraft crew chief". The primary duties included inspection and maintenance of the aircraft. (Tr. 29) This entailed various specific tasks which were highly physically demanding in nature. (Tr. 29-32)

On May 18, 1999, the Claimant was injured while using a manual hydraulic pump to lift a conformal fuel tank for an aircraft into position under its fuselage and wing. (Tr. 33) The manual pumping produced a pressure over 3000 pounds, as necessary to hoist the conformal fuel tank weighing over 900 pounds. (Tr. 32, 35) On one specific pumping motion near the end of the task, the Claimant felt a sharp pain in his right shoulder.

The Claimant sought medical treatment on May 22, 1999, at the Peace Sun Clinic, a government provided clinic on the compound. (Tr. 43-44) He was treated and ultimately referred to Dr. Ghassan Khoury, an orthopedic surgeon. (Tr. 45) Dr. Khoury performed a series of treatments, including surgery done August 17, 1999 in Saudi Arabia. (Tr. 46) The Claimant was also seen by Dr. Randall Rogalsky on July 19, 1999, while on vacation in the United States. (Tr. 47) Dr. Rogalsky concluded that the Claimant had torn his right rotator cuff and agreed with Dr. Khoury regarding the need for surgery. (CX. 53)

After the August 1999 surgery, the Claimant was put on light duty and continued to work. (Tr. 49) He returned to his normal work activities in February 2000, despite his physical limitations. (Tr. 53) The improvement in the Claimant's shoulder after surgery was limited. (Tr. 49) The Claimant testified to pain and spasms in both his neck and spine which caused increased absences at work. (Tr. 54) In June 2000, the Claimant went back to light duty work. Shortly thereafter, the Claimant left Saudi Arabia because of his medical condition. (Tr. 55-56) His employment was terminated in May of 2001.

Once in the States, the Claimant sought treatment by Dr. Rogalsky for his right shoulder. During this time, the Claimant also suffered from severe neck pain due to the automobile accident in 1997. Based on this injury, the Claimant was referred to Dr. Matthew F. Gornet, a neck specialist, who concluded that the neck would require surgery. Drs. Gornet and Rogalsky jointly concluded that right shoulder surgery would be necessary before neck surgery. Thereafter, Dr. Rogalsky operated on the shoulder on January 30, 2001. He found a torn rotator cuff which he repaired with a single figure eight stitch. (CX. 17-18) On July 2, 2001, Dr. Gornet performed neck surgery on the Claimant. (CX. 50) Physical therapy followed both surgeries. (Tr. 109-111) Despite the extensive

treatments, the Claimant testified that with his medical condition as it stands today, he would not be able to go back to work as an aircraft crew chief. (Tr. 114)

Medical Evidence:

Following the injury, on May 22, 1999, the Claimant was examined by Dr. Derek Wayne Hargis in the Peace Sun Clinic, Saudi Arabia. (CX. 3) In his report, Dr. Hargis diagnosed the Claimant as having a strain in the right shoulder. He advised an MRI and surgery, and referred the Claimant to Dr. Kamal. Based on the MRI, Dr. Kamal noted that there was a suggestion of a small tear of the rotator cuff. After a follow up visit on May 29, 1999, Dr. Kamal opined that the shoulder required surgery. The Claimant was thereafter referred to Dr. Khoury. (CX. 25)

Dr. Khoury performed an anthroscopy to the right shoulder on August 17, 1999. (CX. 19) Dr. Khoury noted that there was no definite tear in the rotator cuff. His finding was that there were mild degenerative changes in the glenoid labrum. There was also hyperemia of the undersurface of the rotator cuff, as seen through the arthroscope. The arthroscopic findings were otherwise normal. The plan was to start the Claimant on an aggressive physiotherapy treatment. (CX. 19) The surgery and follow-up treatments were initially considered successful. After an examination on October 6, 1999, Dr. Khoury stated that the Claimant's pre-operative symptoms were almost completely gone. At that time, the Claimant had regained full range of motion of the right shoulder, yet still had significant weakness of the shoulder muscles. (CX. 23) In November of 1999, Dr. Khoury stated that although the range of motion was almost complete, the Claimant still complained of pain with active range of motion especially with the overheard use of the shoulder. Dr. Khoury opined that these symptoms were due to weakness of the deltoid as well as the supraspinatus tendon. (CX. 28)

Dr. Rogalsky, the Claimant's treating physician, first saw the Claimant on July 19, 1999. At that time, based upon the Claimant's history and physical findings, Dr. Rogalsky felt that there was clinical evidence of a rotator cuff tear. (CX. 53) The Claimant's next visit to Dr. Rogalsky occurred on August 28, 2000. Upon examination, Dr. Rogalsky noted that the overall range of motion was full, despite pain. He opined that the Claimant had ongoing pain secondary to deltoid separation from the acromion and possible persistent structural problems. (CX. 53) His examination also suggested that there was a partial separation between the deltoid muscle and the bone that it should be attached to. Given that this separation was not noted in the July 1999 visit, Dr. Rogalsky

proposed that this was a postoperative change. (CX. 53) Based on results from another MRI which confirmed impingement of the acromion upon the rotator cuff, Dr. Rogalsky recommended an open procedure to resect the bony structures that were causing the impingement. (CX. 53)

Dr. Rogalsky performed the surgery on January 30, 2001. He found that the Claimant had evidence of a partial thickness rotator cuff tear, approximately three millimeters in height and one centimeter in length. Dr. Rogalsky indicated that his finding was suggestive of a tear as a result of trauma. He opined that the incident of May 1999, resulting from the repetitive pumping on the hydraulic lifting device, produced the rotator cuff tear seen in the Claimant. (CX. 53)

Dr. Rogalsky also found the Claimant to be totally disabled from May 1999 to May 2001. Since May 2001, Dr. Rogalsky opined that the Claimant could work with a permanent ten-pound lifting restriction. (CX. 53)

Due to the 1997 neck injury, neck surgery was deemed necessary by Dr. Gornet. However, it was decided that the shoulder should be operated on first. On November 15, 2000, in a letter to counsel for the Claimant, Dr. Gornet opined that the neck complaints were directly related to the October 1997 bus accident. (CX. 51) Additionally, Dr. Gornet stated that it was his belief that the Claimant's neck and shoulder complaints were temporarily disabling to him. The Claimant complained that neck pain, beginning immediately after the bus accident, radiated into both arms and numbness into his hands. Dr. Gornet also noted that the Claimant's neck symptoms, as of July 3, 2001, were more serious than any problems in his back. The neck surgery, a microdiskectomy and anterior cervical fusion, occurred on July 3, 2001. (CX. 50)

The record also indicates that the Claimant had an MRI of the right shoulder on September 19, 2000. Dr. Edward Ragsdale interpreted the MRI. Dr. Ragsdale noted that the previous surgery impeded the visualization of portions of the rotator cuff. However, he did note that portions of the rotator cuff, remote from the area of surgery, showed no abnormal signs. (CX. 36)

The record also contains a report from Victoria H. Chabot, D.O., written November 21, 2000. In her report, she notes that there was no radiographic evidence of a rotator cuff tear. (CX. 52) Subsequently, Dr. Phillip G. George reviewed the findings of this report. (EX. 10) Dr. George noted that the normal arthrogram described in Cabot's report ruled out a total or complete tear of the rotator cuff, however the patient could still have a partial

tear. He further opined that a partial tear is not usually a clinical indication for surgery. Specifically, in the Claimant's case, since there was no evidence on the MRI of specific impingement, Dr. George found no clinical indication for surgery of the Claimant's shoulder. He concluded by stating that the Claimant is not a surgical candidate. (EX. 10)

Dr. Frank O. Petkovich examined the Claimant on May 11, 2001. After taking into consideration his medical history, operative reports, physical examination, and x-rays, Dr. Petkovich opined that the two shoulder surgeries the Claimant underwent were necessary to address a rotator cuff tear. He also stated that the condition in the Claimant's right shoulder was idiopathic in nature. (EX. 13) In coming to this conclusion, Dr. Petkovich examined the three incidents where the Claimant suffered injuries to his shoulder: the softball game, the bus accident, and using the manual pump. The incidents themselves may have temporarily aggravated a condition, but Dr. Petrovich opined that the problems associated with the shoulder were chronic changes in the acromioclavicular joint, not acute traumatic conditions. (EX. 13)

Dr. Petkovich concluded that the Claimant had a 10 percent permanent partial disability to the right upper extremity at the level of the shoulder. The disability rating to the Claimant's shoulder was also described as idiopathic in nature and unrelated to any type of work activity. (EX. 11)

Injury Arising Out of the Course of Employment:

The initial question to be resolved is whether Daniel L. Oberts sustained an injury on May 18, 1999, that now entitles him to benefits under the Act. Unquestionably, he suffered from a tear to the rotator cuff. The critical question regarding this condition is whether it was caused or aggravated by the May 18, 1999, work-related incident.

An "injury" is defined in Section 2(2) of the Act as an "accidental injury ... arising out of or in the course of employment." 33 U.S.C. 902(2). The Claimant must initially establish a prima facie case that he suffered an injury. To do so, he must show that he suffered an injury and, that either a work-related accident occurred or that working conditions existed which could have caused or aggravated that injury. Kelaita v. Triple Machine Shop, 13 BRBS 326, 330-331 (1981) See also Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988); Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1990); Perry v. Carolina Shipping Co., 20 BRBS 90 (1987)

If a prima facie case of injury is established, the claimant is aided by a presumption pursuant to Section 20(a) of the Act that the "injury arose out of and in the course of employment." Kelaita, supra at 329-331; See also Wheatley v. Alder, 407 F.2d 307, 312 (D.C. Cir. 1968). The burden then shifts to the employer to produce "substantial evidence to rebut the work-relatedness of the injury." Volpe v. Northeast Marine Terminals, Inc., 671 F.2d 697, 700 (2nd Cir. 1982), citing Del Velcchio v. Bowers, 296 U.S. 280, 285 (1935). After the presumption has been rebutted, the competent evidence must be considered as a whole to determine whether an injury has been established under the Act. Id.; Volpe, 671 F.2d 700; Cairns, 21 BRBS 252 at 254.

Additionally, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Independent Stevedore Co. v. O'Leary, 357 F.2d 812(9th Cir. 1966); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). Also, when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability if that subsequent injury is the natural, unavoidable result of the initial work injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981).

Turning to the case at hand, the Employer does not dispute

that a prima facie case of injury arising out of employment has been established pursuant to §20(a). (ALJX. 2) Upon invocation of the §20(a) presumption, the burden shifts to employer to produce substantial evidence that a causal relationship does not exist between claimant's injury and his employment. American Grain Trimmer, Inc. v. OWCP, 181 F.3d 810 (7th Cir. 1999); Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1997). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Sprague, 688 F.2d at 865. The Employer's burden is not simply to rule out any possible causal relationship between the Claimant's employment and his condition, rather the Employer needs to submit substantial evidence to show that there is probably no causal connection. See Bath Iron Works Corp. v. Director, OWCP, 109 F.3d 53, 56 (1st Cir. 1997); BIW Corp. v. Commercial Union Insurance Co. v. Director, OWCP, 32 BRBS 45,46 (1998).

Reviewing the evidence in this case, I find that the presumption is rebutted. The Employer offers the testimony of Dr. Petkovich as a finding that the Claimant's shoulder condition is idiopathic in nature. Dr. Petkovich found that the Claimant's tear in the rotator cuff was not a result of any acute traumatic injury, rather a condition that developed over a period of time. Dr. Petkovich opined that, although the injury may have created a temporary aggravation of a tendinitis in the Claimant's shoulder, the work injury did not result in any permanent disability. In his opinion, the disabling condition at issue is chronic in nature, developing over a period of time. (EX. 13)

In support of this finding, Dr. Petkovich notes the presence of bone spurs on the undersurface of the clavicle. The presence of bone spurs and the large inferior clavicular osteophyte are both consistent with a degenerative bone spur, chronic in nature. Likewise the hypertrophic bursal tissues and superficial fibrillations are all chronic findings. Dr. Petkovich also disagrees with Dr. Rogalsky's rationale that the rotator cuff tear must have developed from the accident because if it had existed earlier the Claimant would have been unable to do his job. Dr. Petkovich points out that there are many people that have rotator cuff tears and do physical work without being diagnosed until much later on, if at all. (EX. 13)

I hold that the medical opinion of Dr. Petkovich is one which a reasonable mind might accept as adequate to support a conclusion that the Claimant's current condition was not caused by nor the natural result of the May 18, 1999, work-related accident. Since substantial evidence has been produced by the Employer, the Section

20(a) presumption is rebutted.

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and it no longer controls the result. Travelers Ins. Co. v. Belair, 412 F.2d 297 (1st Cir. 1969); John W. McGrath Corp. v. Hughes, 264 F.2d 314 (2d Cir. 1956), cert. denied, 360 U.S. 931 (1959); see also Greenwood v. Army & Air Force Exch. Serv., 6 BRBS 365 (1977), aff'd, 585 F.2d 791, 9 BRBS 394 (5th Cir. 1978); Gifford v. John T. Clark & Son, Inc., 4 BRBS 210 (1976); Norat v. Universal Terminal & Stevedoring Corp., 3 BRBS 151 (1976). Therefore, the Section 20(a) presumption falls out of the case and the judge must then weigh all the evidence and resolve the case based on the record as a whole. Swinton, 554 F.2d 1075, 4 BRBS 466; Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982). Because the Employer has produced substantial evidence rebutting the work-relatedness of the Claimant's present condition, all competent evidence of record must now be reviewed to determine whether an injury has been established under the Act.

An injury under the Act is established if the evidence, when considered as a whole, demonstrates that the Claimant's current disability is directly caused by or due to the natural, unavoidable progression of his May 18, 1999, injury. Even if the Claimant were to have a pre-existing condition, the employer is liable for the entire resulting disability if the work injury aggravates, accelerates, or contributes to the underlying condition. Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Bass v. Broadway Maintenance, 28 BRBS 11 (1994). However, if the disability is due solely to the natural progression of prior injuries or of idiopathic causes, the employer is not liable. Therefore, in this case, to determine the work relatedness of the current disability, we must determine whether a preexisting condition existed, and if yes, whether the May 18, 1999, injury aggravated, accelerated or contributed to the underlying condition.

Reviewing the evidence of record as a whole, I find that the Claimant has established that his present condition was directly caused by the May 18, 1999, work-related accident. This decision is supported by the testimony and medical records provided by Dr. Rogalsky, the Claimant's treating orthopedic physician since 1988. In general, an administrative law judge is entitled to give greater weight to the opinion of a treating physician than to that of non treating physician. See Morehead Marine Services, Inc. v. Washnock, 135 F.3d 366, 371 (6th Cir. 1998). Dr. Rogalsky had the opportunity to evaluate the patient just months after the injury and before the initial surgery by Dr. Khoury. Additionally, Dr. Rogalsky is the surgeon who operated on the Claimant on July 30, 2001, and continues

to monitor the Claimant's progress. In his deposition, Dr. Rogalsky opines that the tear is a result of trauma. He explains that rotator cuff tears that are degenerative in nature or idiopathic are usually simply frayed and irregular with no good soft tissue surrounding the area. In contrast, in traumatic tears, there is a well defined tear, surrounded by good quality tendon tissue. This latter description is consistent with what was found in the Claimant. Furthermore, Dr. Rogalsky stated:

> It would be my opinion that the type of repetitive activity in the position [that was described by the Claimant] would be the precise type of motion which would produce a rotator cuff tear exactly of the type Mr. Oberts demonstrated at surgery.

(CX. 53) His credentials as a board-certified orthopedic surgeon are equal to the credentials of Dr. Petkovich. His opinion is both well-reasoned and well-documented. Therefore, in balancing the medical opinions, I accord greater weight to Dr. Rogalsky's opinion.

Although not the treating physician, the opinion of Dr. Petkovich is also well-reasoned and well-documented. Accordingly, I agree with Dr. Petkovich in that there is a chronic aspect to this case. This opinion is supported by the findings of bone spurs, a large inferior clavicular osteophyte, hypertrophic bursal tissues, and superficial fibrillations, all of which Dr. Petkovich characterized as chronic findings.

However, I am unpersuaded by Dr. Petkovich's description of the "aggravation" that the work-related injury caused. Dr. Petkovich states:

> The third injury as far as the pump I felt could have caused some temporary aggravation of tendinitis in his shoulder, but it was subsequently demonstrated on both of his surgical operative reports ... that what he's describing are chronic changes.

(EX. 13) Dr. Petkovich emphasizes that any aggravation would only be temporary. He also admits that additional stress and irritation to the rotator cuff could result if a person had bone spurs and was subject to the physical demands of the job of the Claimant. This admitted irritation or stress supports my conclusion that, at minimum, the work-related injury aggravated or accelerated a pre-existing impairment which produced a disability greater than that which would have resulted from the work injury alone. Thus, the entire resulting disability is compensable. Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966).

The Nature, Extent and Duration of the Claimant's Disability:

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10). The employee has the initial burden of proving total disability, as well as the burden of proving that the disability is permanent. Eckley v. Fibrex and Shipping Co., 21 BRBS 120 (1998). To establish a prima facie case of total disability, the Claimant must prove, by a preponderance of the evidence that he cannot return to his regular or usual employment due to his work related injury. The Claimant need not establish that he cannot return to any employment, rather only that he cannot return to his usual employment. Elliot v. C & P Tel. Co., 16 BRBS 89 (1984). If the Claimant satisfies this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II), 19 BRBS 171 (1986).

The standards for determining total disability are the same regardless of whether temporary or permanent disability is claimed. Bell v. Volpe/Head Construction Co., 11 BRBS 377 (1979). The Act defines disability in terms of both medical and economic considerations. Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992). The degree of the Claimant's disability, i.e. total or partial, is determined not only on the basis of physical condition, but also on other factors, such as age, education, employment history, rehabilitative potential, and the availability of work. Thus, it is possible under the Act for a Claimant to be deemed totally disabled even though he may be physically capable of performing certain kinds of employment. New Orleans (Gulfwide) Stevedore v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981).

The Employer has paid the Claimant compensation up to and including February 6, 2001. (ALJX. 2) Dr. Rogalsky testified that the Claimant reached the date of maximum healing as of May 9, 2001. (CX. 53) Therefore, the Claimant is requesting compensation from February 7, 2001, to May 9, 2001. Dr. Rogalsky has testified that, despite maximum healing, the Claimant should have restriction of activity. This restriction includes a permanent ten-pound overhead lift restriction with no repetitive overhead reaching or lifting. (CX. 53) The Claimant additionally seeks compensation from May 10, 2001, to July 2, 2001, on the grounds that the Claimant is unable to return to his usual work as a result of this restriction. On July 3, 2001, the Claimant began receiving temporary total disability benefits for the surgery of his neck. Therefore, the entire period in dispute is 20 and 5/7 weeks.

Upon review of the medical evidence, which is discussed in detail above, I find that the preponderance of such evidence clearly

proves that the Claimant suffered from a physical condition aggravated, if not caused, by a work-related accident which occurred on May 18, 1999. However, the nature, extent, and duration of the Claimant's disability due to this injury must be assessed by examining his wage-earning capacity during two distinct time frames. Period One extends from the first day the Claimant was not compensated, February 7, 2001, until the day maximum medical improvement was reached, May 9, 2001. After this date, Period Two begins and extends until July 2, 2001.

Concerning the nature of the Claimant's disability, it is also the Claimant's burden to prove that his injury is permanent. Any disability suffered by the Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolital Area Transit Authority, 16 BRBS 231 (1994). Since maximum medical improvement was not reached until May 9, 2001, I find that for Period One the Claimant is entitled, at most, to only temporary disability benefits under the Act. However, since Period Two begins after maximum medical improvement is met, the Claimant may be eligible during Period Two for permanent disability benefits.

The Employer does not dispute the Claimant's status as disabled during either period of time. Instead, the Employer argues that any present or past disability did not arise from the injury on May 19, 1999, but rather is a consequence of the Claimant's preexisting neck condition. Even if the Employer's contention that the disability arose from the neck injury is correct, the Employer would still be liable if the work-related injury aggravated or accelerated the pre-existing neck condition. However, no evidence has been presented which links the May 18,1999, work-related shoulder injury to the Claimant's neck condition. Therefore, the question lies in whether the disability results from the neck injury or the shoulder injury for which the Employer is liable.

It is undisputed that the Claimant's neck injury on October 27, 1997, left longstanding results, including two cervical disc herniations that ultimately required surgery on July 3, 2001. The Claimant himself admitted that his neck injury required continuing therapy and limited his work activities to a greater extent than his shoulder injury. (Tr. 53) The Claimant also stated that the neck continued to deteriorate after the shoulder injury, requiring frequent therapy in order to be able to continue working. (Tr. 100) Even more importantly, the Claimant stated that the injury to his neck resulted in an inability to perform his duties as a crew chief.(Tr. 108) When opposing counsel asked if he would be able to go back to work at Al Salam, as far as the neck goes, the Claimant stated:

A: No.
Q: Why is that?
A: As far as crew chief, forget it. There's no way. As far as anything else that I had done there, no, I don't think I could tolerate it.
Q: I mean your regular work as crew chief.
A: No. There's no way. That's impossible.
Q: Why is that?
A: I can't do it. I couldn't lift my tool box much less try to lift tires and install tires or brakes or anything like that. There's just absolutely no way.
Q: We're talking about because of the neck?
A: Yes.

(Tr. 109)

The Claimant's statements made at trial are consistent with statements made by Dr. Rogalsky. Dr. Rogalsky explained in his deposition that the Claimant would have been able to go back to work with a ten pound lifting restriction in place on May 9, 2001, if not for the neck injury. He states:

> He was still completely disabled due to his neck, and I was not sure how long the neck would keep him out of any employment.

(CX. 53) The surgery arising from the neck injury occurred on July 3, 2001.

Likewise, the record indicates that Dr. Gornet opined that the Claimant's neck and shoulder complaints are totally disabling to him. Although not specifying whether the neck injury alone would cause the Claimant to be disabled, the record seems to indicate that Dr. Gornet found the neck symptoms to be more severe than the shoulder symptoms. On July 2, 2001, Dr. Gornet notes that the Claimant's neck symptoms are worse than his back. There is no mention at all of any shoulder problems. (CX. 52)

If this argument is valid at all, it arguably can only apply to Period Two. The medical evidence undisputedly establishes that the Claimant was unable to perform any work from February 7, 2001, to May 9, 2001. Additionally, none of the statements from either doctor or the Claimant contradict this finding. As such, the Claimant has satisfied his prima facie case as to Period One. No evidence has been offered by the Employer demonstrating the availability of suitable alternative employment during Period One. Therefore, the presumption of total disability for this time frame is not rebutted and I find that during this time frame, the Claimant

was temporarily and totally disabled.

As for Period Two, I find that the Claimant has also established a prima facie case. Although Dr. Rogalsky stated that the Claimant could return to work during this period if not for the neck injury, the Claimant was restricted in the activities he could perform. These restrictions would seriously interfere with his ability to perform the job of aircraft crew chief. In fact, Dr. Rogalsky opined that the Claimant was not physically capable of returning to work in the job of crew chief. (CX. 53,M) The necessity of such restrictions has not been disputed by the Employer. Likewise, the statements noted above which point to the neck injury as being disabling does not in any way diminish the existence of the restrictions that the Claimant is subject to as a result of his shoulder injury. Additionally, no evidence has been offered by the Employer demonstrating the availability of suitable alternative employment during Period Two. Therefore, the presumption of total disability for this time frame is not rebutted and I find that during this time frame the Claimant was permanently and totally disabled.

The presence of a disabling neck condition concurrent with the disabling shoulder injury does not preclude recovery in this case. The medical evidence in record does not establish that the 1997 neck injury was aggravated by the 1999 shoulder injury or vice versa.

Average Weekly Wage:

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137 (1990); Orkney v. General Dynamics Corp., 8 BRBS 543 (1978); Barber v. Tri-State Terminals, 3 BRBS 244 (1976), aff'd sub nom. Tri-State Terminals v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). Section 10(a) applies if the employee "worked in the employment... whether for the same or another employer, during substantially the whole year immediately preceding the injury." Hole v. Miami Shipyards Corp., 12 BRBS 38 (1980), rev'd on other grounds, 640 F.2d 769 (5th Cir. 1981). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" (within the meaning of Section 10(a)) prior to injury. Id. Section 10(c) contains the general, catch-all provision applicable in cases where the methods in subsections (a) and (b) cannot be realistically applied. Section 10(c) should be used in cases where

the actual earnings during the year preceding the injury do not reasonably and fairly represent the pre-injury wage earning capacity of the claimant. Gilliam v. Addison Crane Co., 21 BRBS 91, 92-93 (1987). Section 10(c) also is used where the record contains insufficient evidence from which to make a determination of an average daily wage under either subsections (a) or (b). Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176 (1974). In this case, although the Claimant worked for a full year preceding the claimed injury of May 18, 1999, the parties do not have any precise wage records from which they may establish Claimant's average weekly wage under §10(a). Therefore, calculation under §10(c) is appropriate.

The prime objective of Section 10(c) is to arrive at a figure that reasonably represents a claimant's annual earning capacity at the time of his injury. Staftex Staffing v. Director, OWCP, 237 F.3d 404, 407, 34 BRBS 44, 46(CRT)(5th Cir. 2000); Hall v. Consolidated Employment Systems, 139 F.3d 1025, 1031, 32 BRBS 90, 95-96(CRT)(5th Cir.1998); SGS Control Services v. Director, OWCP, 86 F.3d 438, 441, 30 BRBS 57, 59(CRT)(5th Cir. 1996); Empire United Stevedores v. Gatlin, 936 F.2d 819, 823, 25 BRBS 26, 29(CRT)(5th Cir. 1991). In determining earning capacity under Section 10(c), "the administrative law judge must make a fair and accurate assessment of the injured employee's earning capacity the amount that the employee would have the potential and opportunity of earning absent the injury." Gatlin, 936 F.2d at 823, 25 BRBS at 29(CRT). Typically, this earning capacity will be best reflected by the injured employee's wages at the time of his injury. See Staftex Staffing, 237 F.3d at 407, 34 BRBS at 46(CRT); Hall, 139 F.3d at 1031, 32 BRBS at 96(CRT). Neither the claimant's actual earnings at the time of injury, nor the actual earnings of other employees in the same class of employment controls the administrative law judge's average weekly wage calculation under Section 10(c), although they are factors to be considered by the administrative law judge in making his determination. See Gatlin, 936 F.2d at 823, 25 BRBS at 29(CRT). An administrative law judge has significant discretion in determining the appropriate average wage. See Staftex Staffing, 237 F.3d at 406, 34 BRBS at 45(CRT); Bunol, 211 F.3d at 297, 34 BRBS at 32(CRT). The administrative law judge's average weekly wage determination, however, must be based on adequate evidence of record. See Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981); Wise v. Horace Allen Excavating Co., 7 BRBS 1052 (1978).

The Employer argues that based upon §10(c), the average weekly wage in this case should be set at $968.13. The Claimant avers that average weekly wage should be $1,595.25. Additionally the Claimant argues, the Employer's figure fails to take into consideration

numerous additional benefits, such as home leave, incentive leave, service completion payments, and payments for the education of the Claimant's sons.

Section 2(13) of the Act defines wages as "the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954." 33 U.S.C. §902(13). The definition specifically does not include fringe benefits. The Act defines a "fringe benefit" as "including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security, or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement." Id. See also Morrison-Knudsen Constr. Co. v. Director, OWCP., 61 U.S. 624, 15 BRBS 155 (CRT) (1983). For the most part, fringe benefits are not easily convertible into cash, or are speculative. Morrison-Knudsen, 461 US at 624.

In making my determinations, I initially find that the education costs of the Claimant's children's tuition does not qualify as wages under the Act. The very definition of fringe benefits under §902(13) includes "any other employee's dependent entitlement." Based on the clear language of the statute, I find the tuition costs to be a fringe benefit and thus excluded from the calculation of the Claimant's average weekly wage.

However, I find that Claimant's wages includes the service completion awards. Such awards are not speculative, but set forth in the contract in prescribed amounts. Also, the awards are not made subject to any discretion of the Employer. Therefore, the awards are distinguishable from a contingent right to a bonus. Instead, upon successful completion of a given year, the employee would be automatically entitled to $3,000.00 (after one year on assignment), $5,000.00 (after the second year on assignment), or $7,000.00 (accumulated and paid upon completion of each additional year on assignment). (CX. 1)

I also find that both home leave and incentive leave given by the Employer are considered wages under the Act. The home leave was based on the cost of round trip airfare on Saudia Airlines for the entire family. The amounts were determinable at the end of each year and the funds were distributed whether or not the employee chose to travel. (CX. 1) Incentive leave was given at the completion

of six continuous months on assignment and once every twelve continuous months thereafter. The employee and members of his family were given the following amounts: $2,100.00 per adult, $1,050.00 per child. (CX. 1) Such leave is comparable to earned vacation time. Therefore, under established case law, the costs must be included in determining average weekly wage. See Sproull v. Stevedoring Servs. of America, 25 BRBS 100 (1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 136 (1990); Rayner v. Maritime Terminals, 22 BRBS 5 (1998); Waters v. Farmers Export Co., 14 BRBS 102 (1981), aff'd per curiam, 710 F.2d 836 (5th Cir. 1983).

The Employer argues that home leave and incentive leave money that the Claimant purports to have received in 1998 should be excluded from the calculation of the average weekly wage since the "Foreign Earned Income Statement" issued by the Employer shows no record that the Claimant received the claimed amount. (CX. 2) However, the Claimant produced his 1998 federal tax return which identified the amount of "home leave" paid on behalf of the Claimant's services as $16,752. (CX. 2) Employer argues that since the record does not substantiate this entry on Claimant's tax return, that the amount is not credible and must be excluded. I disagree with this contention. First, I see no reason why the Claimant would report income he did not receive, particularly in light of the fact that the tax return would have been filled out before the accident at issue even occurred. Secondly, the amount of home leave reported in the tax return is substantiated to some extent by the entitlements set forth in the Claimant's employment contract. The contract itself states that annual and incentive leave money would be included as part of the Claimant's compensation. Therefore, it is entirely believable that the money was paid out to the Claimant as set forth in the contract. Accordingly, I find the Claimant's 1998 tax return to be credible evidence that the Claimant received incentive and home leave in the amount of $16,752.00 from the Employer.

The Claimant put forth an additional $10,671.79, to add to his 1998 earnings. This amount has been characterized as "income from Mc.Donnell Douglas, for the first month of the year plus the incentive and home leave and service completion prorated." (See Claimant's Post-Trial Memorandum.) This amount is corroborated with the Claimant's 1998 W-2 Tax Statement. (CX 2) The earnings analysis from the W-2 separate the wages as such: regular pay, $2,255.40; service award, $1,561.64; incentive leave, $6,300.00; "epip" award, $554.75. In light of the disparity between the amount received due solely to regular income and the amount received due to awards and earned leave, it appears clear that the awards and earned leave were not given in as compensation for the eleven days

worked (from January 1, 1998 to January 11, 1998). Rather it seems likely that these amounts are part of the benefits gained by working in 1997. Therefore, only the Claimant's regular pay of $2,255.40 will be used in the calculating 1998 earnings.

In sum, 1998 total earnings, calculated by adding salary with the incentive and home leave, is found to be $59,006.67. The 1999 total earnings equate to $67,357.02. These earnings must then be prorated resulting in the following amounts: 1998- $36,697.30; 1999 - $25,466.48. Relying on these calculations, I find that the Claimant's average weekly wage at the time of injury was $1,195.46.

Attorney Fees:

No award of attorney's fees for service to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby allowed for the Claimant's counsel to submit an application. The application must conform to 20 C.F.R. § 702.132, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served shall have 10 days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

Entitlement:

The evidence in the record supports the conclusion that Daniel L. Oberts was temporarily totally disabled from February 7, 2001, to May 9, 2001, and permanently totally disabled from May 10, 2001 to July 2, 2001, as a result of a work-related injury occurring on May 18, 1999. Drs. Rogalsky and Petkovich both determined that the Claimant suffered a tear to his right rotator cuff. Dr. Rogalsky determined that this tear was a result of his May 1999 work-related incident. It is also undisputed that the Claimant has been unable to return to his usual job. I therefore find the Claimant entitled to temporary total disability compensation from February 7, 2001, until May 9, 2001. I further find the Claimant entitled to permanent total disability compensation from May 10, 2001, to July 2, 2001. I find that the Claimant's average weekly wage at the time of injury was $1,195.46. I further find the Claimant is entitled

to reimbursement for past medical expenses incurred for treatment of his injury.

ORDER

Based on the Findings of Fact and Conclusions of Law expressed herein, IT IS HEREBY ORDERED that:

1. The Employer, Al Salam Aircraft Co., shall pay the Claimant, Daniel L. Oberts, compensation for temporary total disability in the amount of $10,360.55, for the period of February 7, 2001, until May 9, 2001, representing the period the Claimant was unable to work due to his disability, and based on the Claimant's average weekly wage of $1,195.46, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(b).

2. The Employer, Al Salam Aircraft Co., shall pay the Claimant, Daniel L. Oberts, compensation for permanent total disability in the amount of $6,148.02, for the period of May 10, 2001, until July 2, 2001, representing the period the Claimant was unable to work due to his disability, and based on the Claimant's average weekly wage of $1,195.46, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(b).

3. The Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May 18, 1999, work-relayed accident/ injury, pursuant to the provisions of §7 of the Act.

4. The Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. The Claimant’s attorney shall file, within thirty days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer’s counsel who shall have ten days to file objections. 20 C.F.R. § 702.132.

A

DANIEL J. ROKETENETZ
Administrative Law Judge